

The administrative file also included a February 3, 2004, medical report from Dr. Lanny W. Harris to former Administrative Law Judge Jon Frobish. The file does not disclose that Dr. Harris was authorized by the Judge to perform any type of independent medical examination. But the parties represented to the Board that former Administrative Law Judge Jon L. Frobish ordered an evaluation for determining issues regarding

additional medical treatment. Therefore, the February 3, 2004, medical report is part of the record on this appeal and should be considered insofar as appropriate.¹

ISSUES

This is a claim for bilateral upper extremity injuries. In the May 7, 2008, Award, Judge Hursh followed the principles set forth in *Casco*² and found the evidence established claimant's injuries did not result in permanent total disability. Consequently, the Judge awarded claimant permanent partial disability benefits under the schedule of K.S.A. 44-510d for a 15 percent functional impairment to her right forearm and a 15 percent functional impairment to her left forearm.

Claimant contends Judge Hursh erred by finding respondent rebutted the presumption that she was permanently and totally disabled. Claimant argues the *totality of circumstances* should be considered when determining whether she is permanently and totally disabled. Claimant contends there is no job she can realistically perform. Claimant's argument is summarized, as follows:

In the case before the Board, it is apparent that there is more to Claimant than just her work restrictions. As noted by the Court of Appeals, it is necessary to look at the totality of the circumstances in determining whether Claimant is permanently and totally disabled, not to look at each component of Claimant's life in isolation. As pointed out in Respondent's cross examination of Terrill, Claimant[s] intelligence and experience were limited prior to the work injury whereby limiting the jobs she could ever in her lifetime been qualified to perform. The addition of the physical work restrictions then makes that job pool even smaller, making Claimant permanently and total[ly] disabled pursuant to K.S.A. 44-510c(a)(2).

It is undisputed that Claimant has maintained some type of manual labor job based on her 15 year work history with more than 7 years of that with Respondent. It is apparent that Claimant is a worker. Claimant has always had to rely on her brawn rather than her brains due to her actual skills and experience and has managed to earn a living; that is, until her work injury with Respondent. Unfortunately for Claimant, the addition of the physical work restrictions imposed because of her work injury herein has created an insurmountable obstacle in realistically finding a job. Simply put, Claimant's job market was small based upon her intelligence, education and training prior to her work injury. Following her work

¹ See K.S.A. 44-516.

² *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh'g denied* (2007).

injury she was given physical work restrictions which basically, for lack of a better term, were the 'final nail in the coffin' to Claimant's ability to work. In looking at the tasks Claimant can perform now coupled with her lack of ability to learn new skills, it is clear there is no job that she can realistically maintain.³

In short, claimant requests the Board to find she is permanently and totally disabled.

Conversely, respondent requests the Board to affirm the Award. Respondent contends the Board should not consider claimant's intelligence quotient (IQ) and achievement skills in determining whether she is permanently and totally disabled. Respondent argues, in part:

While claimant's low IQ and achievement abilities may have limited her employment choices all of her life, her low IQ was not caused by her work-related injury. Therefore, it is inappropriate to consider low IQ as a factor in determining whether claimant is unemployable. Under the totality of the circumstances approach recommended in *Wardlow v. ANR Freight Systems*, 19 Kan.App.2d 110, 872 P.2d 299 (1993), claimant still has the ability to engage in substantial and gainful employment. The Administrative Law Judge properly concluded that the presumption of permanent total disability had been rebutted by all the evidence. With these considerations in mind, respondent respectfully requests the Board find that claimant is not permanently and totally disabled.⁴

The issue on this appeal is whether respondent rebutted the presumption that claimant was rendered permanently and totally disabled as a result of the bilateral upper extremity injuries she sustained while working for respondent.

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Respondent manufactures, among other items, sleeper cabs for trucks. Claimant assembled those cabs, which required her to use her hands in a repetitive and forceful manner. There is no dispute claimant, who worked seven years for respondent, developed bilateral carpal tunnel syndrome from performing that work. Likewise, there is no dispute that claimant's bilateral upper extremity injuries arose out of and in the course

³ Claimant's Brief at 6 (filed June 30, 2008).

⁴ Respondent's Brief at 2 (filed July 25, 2008).

of her employment with respondent. Lastly, there is no dispute that in 2006 claimant underwent bilateral carpal tunnel release surgery for the injuries she sustained working for respondent and that she now has a 15 percent impairment to each forearm as measured by the AMA *Guides*.⁵

The parties stipulated the date of accident for determining claimant's benefits under the Workers Compensation Act for these repetitive trauma injuries was November 5, 2002, which is the approximate date when claimant notified respondent of her upper extremity symptoms and her last day of working for respondent.

Claimant was born in December 1959, which currently makes her 48 years old. Claimant has a seventh grade education, no technical training, and she has not obtained a GED. In the 15 years before November 2002, claimant worked five or six other jobs other than the seven years she worked for respondent – three or four months as a clerk for a dry cleaner, one or two months as a prep cook for McDonalds, approximately eight months as a dishwasher and cook for a hickory house, approximately three years as a housekeeper for New Horizons, approximately two years as a cook for New Horizons, and approximately 2½ years as a dietary aide for a rehabilitation nursing home.

After being laid off by respondent, more health problems befell claimant. Sometime in 2003 claimant fell ill with pneumonia and developed chronic obstructive pulmonary disease (COPD). As a result of the COPD claimant began using oxygen. The record does not disclose when claimant applied for Social Security disability benefits or when the benefits actually commenced, but the record indicates claimant qualified for those benefits commencing March 2003.

Since leaving respondent's employment claimant has worked only three months. And that employment was with a cleaning service and lasted from approximately June through August 2003. According to claimant she was unable to continue working because of her hands. Claimant has not sought any employment since that time.

In February 2008, claimant testified she takes a portable oxygen bottle with her everywhere she goes as she might need it. Claimant also testified she used oxygen at night but only a couple hours during the day, or when otherwise needed, but that it generally depended upon her activity level and even the humidity. Claimant utilized a portable oxygen bottle when working for the cleaning service and she believes her COPD does not prevent her from working.

⁵ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Under *Casco*,⁶ there is a presumption that claimant is permanently and totally disabled under K.S.A. 44-510c. In addition, claimant presented the expert testimony of vocational consultant Karen Crist Terrill, board-certified orthopedic surgeon Dr. Edward J. Prostic, and school psychologist Mary Lynn Sylvester in support of that presumption.

Dr. Prostic, who examined claimant at her attorney's request on three different occasions, last examined claimant in February 2008 and found she had severe tenderness in her palms and poor grip and pinch strength. Dr. Prostic concluded claimant was unable to perform work that required much use of her hands or more specifically forceful gripping or substantial keying or handwriting. And considering her hand difficulties, training, experience, and intelligence it was difficult for the doctor to imagine her returning to any gainful employment. The doctor testified, in part:

My opinions are the same that she is not capable of going back to her previous employment. She is not capable of doing activities that require forceful gripping or significant handwriting or keying. And that because of the combination of her hand difficulties and her training, experience, and intelligence that it is hard for me to imagine her going back to gainful employment.⁷

According to Dr. Prostic, the bilateral carpal tunnel release surgery helped resolve claimant's sensory deficits but she had a poor response in terms of pain and motor function. The doctor rated claimant as having a 15 percent functional impairment to each upper extremity as measured by the *AMA Guides*. Dr. Prostic also reviewed the list of former work tasks prepared by Ms. Terrill and concluded claimant had lost the ability to perform 70 percent of the 40 tasks. Interestingly, Dr. Prostic's July 30, 2007, medical report to claimant's attorney indicated claimant had not returned to work following her bilateral carpal tunnel release surgeries *because she was suffering from COPD*.

Ms. Terrill likewise testified claimant was unable to perform any of her former jobs due to her work restrictions.⁸ Moreover, Ms. Terrill determined claimant was unable to perform other substantial and gainful work in the open labor market due to her injuries, lack of transferable job skills, lack of education, IQ, and poor achievement test results. Indeed, Ms. Terrill believed claimant would be unable to perform the job of a greeter at Wal-Mart due to the different tasks that job might require. In short, Ms. Terrill believed claimant had

⁶ *Casco*, 283 Kan. 508.

⁷ Prostic Depo. (Feb. 29, 2008) at 8.

⁸ As shown in her November 27, 2007, report, Ms. Terrill considered the February 2004 restrictions from Dr. Lanny W. Harris (no repetitive hard grasping, gripping and lifting with both upper extremities) and the July 2007 restrictions from Dr. Edward J. Prostic (no forceful gripping or substantial keying or handwriting).

a very limited labor market before she developed bilateral carpal tunnel syndrome and now that labor market has been extinguished due to her bilateral upper extremity injuries.

Claimant also presented the testimony of Ms. Sylvester, the 2007 Kansas School Psychologist of the Year. In early November 2007 Ms. Sylvester gave claimant IQ and achievement tests to measure her intellectual potential and her level of basic academic information. Ms. Sylvester determined claimant had an IQ of 68, which placed her in the 2nd percentile, or second from the bottom in a group of 100 people. The tests also placed claimant in the 1st percentile in fluid reasoning (problem solving using inductive and deductive reasoning), the 1st percentile in knowledge (accumulated fund of general information from both school and life experiences), the 3rd percentile in quantitative reasoning (mathematical problem solving ability), the 12th percentile in visual spatial skills (ability to see patterns, relationships, spatial orientations), and 9th percentile for working memory (short-term memory).

In addition, the tests administered by Ms. Sylvester indicate claimant's percentile ranking (less than one percent) for her abbreviated battery IQ that measures non-verbal fluid reasoning and verbal knowledge is extremely low . Ms. Sylvester testified, in part:

Q. (Mr. Phalen) And it [exhibit 1] states that the abbreviated battery IQ measures the areas of non-verbal fluid reasoning and verbal knowledge, includes two of the most important abilities predictive of academic and vocational advancement. Did I read that correctly?

A. (Ms. Sylvester) Yes.

. . . .

Q. Have you ever seen a lower percentile ranking for abbreviated battery IQ in all of your years as a school psychologist?

A. Very rarely and I would say extremely rarely. This is a very, very low percentile ranking.⁹

In short, claimant's IQ test scores placed her in the mildly delayed category and age equivalent categories of seven to nine years old. Claimant's achievement tests also placed claimant in the lower categories in academic knowledge (5th percentile), broad reading skills (11th percentile), and broad math skills (4th percentile). Accordingly, claimant's achievement tests are equivalent to children in the 1st through 3rd grades.

⁹ Sylvester Depo. at 18.

Respondent counters the above evidence with statements from claimant and the testimonies of Dr. Sandra Barrett and vocational rehabilitation consultant Steve Benjamin. Incredulously, claimant testified in February 2008 that her hands did not bother her now and they did not keep her from working. Claimant testified, in part:

Q. (Mr. Phalen) What about your hands keeps you from working?

A. (Claimant) They just -- they keep me from working now?

Q. Yes, why -- what keeps you --

A. No, I -- they don't bother me now. I could work.

Q. You could work with your hands?

A. Well, they don't bother me now.

Q. So you think you could work because of your hands now, Carol?

MR. WELTZ: It's asked and answered. I object.

Q. (By Mr. Phalen) Carol, think about what you just said. You think that you can work because of your -- you're on Social Security disability.

A. Oh. Well, no, I couldn't work.¹⁰

Claimant once again contradicted her testimony at her February 2008 deposition. After first testifying her hands were better she then changed that testimony after additional questioning by her attorney. That exchange went as follows:

Q. (Mr. Phalen) Now, when you said that your hands were better earlier, tell the Court what you meant by that.

A. (Claimant) My hands were better after I had my surgery.

Q. Are they completely better?

A. Yes.

Q. They are completely better? You don't have any symptoms?

A. Well, just in the -- my -- the scarring, the gripping and the scarring.

¹⁰ Maslen Depo. at 24.

Q. Do you have numbness and tingling still?

A. Yes.

Q. All right. So your hands aren't better?

MR. WELTZ: Objection, it's leading.

MR. PHALEN: Well, I'll give you that one.

Q. (By Mr. Phalen) Are your hands better?

A. No.¹¹

Dr. Sandra Barrett, who is board-certified in physical medicine and rehabilitation, examined claimant in January 2008 and concluded claimant sustained a 15 percent impairment to each upper extremity due to the median nerve compression in her wrists. The doctor recommended that claimant avoid activities that require forceful grasping, repetitive use of her hands, keyboards, and vibratory tools. Given those restrictions, the doctor believed claimant could return to substantial and gainful employment. After reviewing the list of former work tasks prepared by Steve Benjamin, the doctor indicated claimant should no longer perform 25 of the 47 tasks, or approximately 53 percent.

In addition, Dr. Barrett testified that claimant specifically advised she had not been working due to her breathing problems. The doctor, however, noted claimant complained of constant soreness at her wrists that claimant rated 7 or 8 out of a maximum of 10 that increased when using a mop or broom or washing dishes. The doctor recommended that claimant continue her home exercises and desensitization techniques that she had started in therapy.

Respondent also presented the testimony of Dr. Brian K. Ellefsen, the orthopedic surgeon who performed claimant's bilateral carpal tunnel releases. The doctor operated on claimant's right hand in August 2006, operated on her left hand in September 2006, and released her from treatment in December 2006. Because claimant was not working at the time of her release, the doctor did not give her any restrictions. Nevertheless, the doctor testified that had she been working he would have restricted her from using torque tools; repetitive gripping and pinching; and forceful pushing and pulling.

Using the *AMA Guides* (5th ed.), Dr. Ellefsen rated claimant as having a five percent impairment at the right wrist and a seven percent impairment at the left wrist. Considering

¹¹ *Id.* at 29, 30.

her bilateral carpal tunnel syndrome only, Dr. Ellefsen believed claimant could work. But considering the results from claimant's IQ and achievement tests, the doctor believed claimant was unable to perform substantial and gainful employment.

Last but not least, respondent presented the testimony of vocational rehabilitation consultant Steve Benjamin. Mr. Benjamin interviewed claimant in late February 2008 and determined claimant had performed approximately 47 different tasks in the 15 years before November 2002. More importantly, he concluded claimant retained the ability to work in the open labor market and earn an average of \$263.40 per week. Some of the jobs Mr. Benjamin believed claimant could perform were a counter/rental clerk who works the counter of a store, a driver of a van or school bus, a front line fast food worker who waits on customers or puts meals together, a personal home attendant who might perform light cleaning and cooking, a retail salesclerk, and a waitress. In concluding claimant retained the ability to work in the open labor market, Mr. Benjamin considered that claimant could still lift as much as she wanted; bend and stoop as much as she wanted; and sit, stand, and walk as much as she wanted. Mr. Benjamin stated, in part:

The basic restriction is is that she can't do a job which requires repetitive hand activity or forceful gripping, and there are plenty of positions available in the open labor market that are not repetitive in nature that are entry level.¹²

As noted by Judge Hursh, there is substantial, competent evidence in the record to support claimant's allegation that she is permanently and totally disabled as well as substantial, competent evidence that she retains the ability to work. The Board finds the greater weight of the evidence indicates that claimant's principal problem with her hands is the pain that is localized over her incisions from the bilateral carpal tunnel releases. And although she is now restricted from performing repetitive activities with her hands and forceful grasping, her upper extremity symptoms are not severe enough to prevent her from working. As Mr. Benjamin pointed out, claimant retains the ability to lift, bend, stoop, sit, stand, and walk.

Moreover, the Board is unable to ignore claimant's testimony that her hands no longer bother her and she believes she could work. The Board rejects claimant's argument that she was *confused* when she provided that testimony as claimant was not merely responding to a leading question. Instead, claimant made the affirmative statement that her hands were not bothering her now and that she believed she could work. Finally, much has been made of claimant's IQ and achievement scores, which place her in the lower percentiles. Although the test scores are important, they are only one factor to consider. Most importantly, claimant has over the years successfully maintained employment in the

¹² Benjamin Depo. at 9, 10.

open labor market. It is true claimant's labor market has been further diminished by her bilateral upper extremity injuries. Nevertheless, the presumption against permanent total disability has been overcome and the evidence otherwise fails to prove that claimant is permanently and totally disabled.

CONCLUSIONS OF LAW

The Kansas Supreme Court in the *Casco*¹³ decision held that bilateral upper extremity injuries create the presumption that a worker is permanently and totally disabled and when that presumption is rebutted the injured worker's permanent disability benefits for each upper extremity are determined under the schedule of K.S.A. 44-510d.

As indicated above, claimant retains the ability to perform light, unskilled work that does not require either forceful or repetitive use of her hands. Consequently, the Board finds the presumption of a permanent total disability is rebutted. Claimant sustained a 15 percent impairment to each forearm as measured by the *AMA Guides* and, therefore, claimant is entitled to receive permanent disability benefits based upon those functional impairment ratings for two scheduled injuries under K.S.A. 44-510d.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹⁴ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board affirms the May 7, 2008, Award entered by Judge Hursh.

IT IS SO ORDERED.

¹³ *Casco*, 283 Kan. 508.

¹⁴ K.S.A. 2007 Supp. 44-555c(k).

Dated this ____ day of September, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Michael D. Streit, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge